89-787

No. _____

Supreme Court, U.S.
FILED
NOV 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT E. HEDICKE,

Petitioner,

vs.

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI FROM THE
COURT OF CRIMINAL APPEALS OF TEXAS

APPENDIX
PETITION FOR WRIT OF CERTIORARI

NORMAN N. ROSEN
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Robert E. HEDICKE, Appellant,

v.

The STATE of Texas, Appellee.

No. 1079-86.

Court of Criminal Appeals of Texas,

En Banc.

June 21, 1989.

Robert B. Wales, El Paso, for appellant.

Steve W. Simmons, Dist. Atty., and Robert Dinsmoor, Asst. Dist. Atty., El Paso, Robert Huttash, State's Atty., Austin, for the State.

Before the court en banc.

OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

WHITE, Judge.

Appeal is taken from a conviction for felony theft over $10,000. Appellant pled guilty and elected to have the jury assess punishment. Appellant filed an application for probation which the jury denied in assessing punishment at eight years imprisonment.

The Eighth Court of Appeals, in an unpublished panel opinion, unanimously affirmed the conviction. Hedicke v. State, No. 08-84-00219-CR (Tex.App.--El Paso, 1986). We granted appellant's petition for discretionary review to determine whether the Court of Appeals correctly upheld the trial court's action of excluding defensive character testimony at the punishment phase of trial. See, Tex.R.App.Proc., Rule 200(c)(4). Although we ultimately reach the same result as the court below, we do so for very different reasons.

At the punishment phase, and after the defensive testimony of the defendant and the director of the Adult Probation Department Restitution Center, the trial court, following a bench conference off the record, called the remaining defense witnesses into the courtroom and sua sponte admonished them as follows:

> Ladies and gentlemen, Mr. Wales [defense counsel] has informed me that you have

> been summoned here as character witnesses. Now, a character witness is a very restricted kind of a witness. You are not going to testify about the facts in the case. You are limited to testifying about whether you know the defendant, what [are] the circumstances under which you know him, and then the question do you know his reputation. That does not mean what is your personal opinion, but do you know his reputation for--if the question is asking for his reputation for truth and voracity [sic] in the community in which he lives, your answer to that has to be either yes or no. You can't elaborate. Then the question is is that reputation good or bad, and your answer has to be good or bad, and you can't elaborate on your answer.
>
> . . . .
> I'm sorry, I know everybody wants to come down here and wants to speak for a friend and wants to say more than that, but the law does not permit it. We'll just get into long--I've seen witnesses do it hundreds of times.

Appellant objected to the admonishment in that it denied him the opportunity to elicit testimony from these witnesses concerning specific instances of good conduct and positive personal opinions. His objection was overruled.

Appellant's present challenge to the trial court's limitation of defensive character testimony is basically two-fold: that the court erroneously precluded (1) testimony concerning specific instances of good conduct and (2) opinion testimony. We will uphold the trial court's ruling in the former but the ruling as to the latter is erroneous.

Concerning the court's exclusion of specific instances of conduct, Article 37.07, Sec. 3(a), V.A.C.C.P., states, in pertinent part,

> Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state or the defendant as to the prior criminal record of the defendant, his general reputation and his character.[1]

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[1]Although applicable at the time of the instant trial in this form, this statute has since been substantially altered. See, Art. 37.07, Sec. 3(a), V.A.C.C.P. (Supp. 1988); Tex.R.Crim.Ev., Rules 404(c) and 405(a).

In Murphy v. State, --- S.W.2d ---, No. 102-86 (Tex.Cr.App. 1989) (Opinion on Rehearing), this Court overruled a substantial amount of caselaw to hold that specific instances of conduct, even when offered as relevant to a defendant's application for probation, are generally inadmissible.[2]

In the instant case, appellant wanted to introduce testimony concerning specific instances of good conduct. Based upon Murphy, supra, we conclude the trial court correctly precluded such testimony. Thus, appellant's first challenge to the court's limitation of character evidence at punishment is overruled.[3]

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[2]This writer dissented to the majority opinion in Murphy, and although still standing by my original position, I recognize allegiance to stare decises and thus abide by the rule of law adopted by a majority of this Court.

[3]Appellant also urges a Due Process violation involving a restriction on his constitutional right to present evidence in mitigation of punishment under the restrictive

Appellant secondly urges error in the trial court's exclusion of opinion testimony. Article 37.07, Sec. 3(a), supra, explicitly authorizes the admissibility of the defendant's "prior criminal record ... his general reputation and his character."[4] Art. 37.07, Sec. 3(a), supra. So the question becomes a determination of what is meant by the term "character" under 37.07, and whether opinion testimony is included within its meaning. This question brings directly to the forefront the pervasive and historical misunderstanding of what character evidence encompasses. As anomalous as it may seem,

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Murphy reading of Art. 37.07, Sec. 3(a). Although such an argument presents interesting and provocative issues, it was not argued at trial or on direct appeal but was only urged for the first time in his motion for rehearing. Thus, this question, not having been raised or addressed by the court below, is waived as untimely.

[4]Emphasis supplied throughout unless otherwise indicated.

although Art. 37.07, Sec. 3(a) has been in effect in almost the same form for over twenty years,[5] this appears to be a case of first impression as to the exact meaning of the term "character" in this context.[6] In dealing with this point, the Court of Appeals understandably did not even attempt to make sense of the caselaw. The court found that even if there was error in excluding all

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[5]Although reading the same, sec. 3(a) was originally contained in sec. 2(b) of 37.07, but was subsequently renumbered. When this section was renumbered to 3(a), in 1967, the following sentence was added: "The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged." Acts 1967, 60th Leg., p. 1739, ch. 659, sec. 22.

[6]Although past opinions have recognized the linguistic problem concerning the meaning of character evidence under 37.07, they have skirted direct examination of the issue. See, e.g., Butler v. State, 640 S.W.2d 612, 614 (Tex.Cr.App.1982); Jones v. State, 479 S.W.2d 307, 311 (Tex.Cr.App. 1972) (Roberts, J., concurring); Logan v. State, 455 S.W.2d 267 (Tex.Cr.App. 1970).

opinion testimony, it was harmless, with the totality of their legal analysis being, "[c]ase law is somewhat less than clear as to what is and what is not error in the area of exclusion of character evidence under 37.07." Ironically, we finally specifically deal with this question only after it has been statutorily resolved. See, fns. 1 ante and 7 post. Nonetheless, we offer the instant opinion as belated clarification.

At the present time it should be crystal clear that character evidence is nothing more than a very generalized term which describes a broad category of evidence. Character comprises a melange of personality traits and consequently there are varying evidentiary ways to prove character. Butler v. State, supra at 614; Mason v. State, 604 S.W.2d 83, 86 (Tex.Cr.App. 1979) (Clinton, J., dissenting); Ward v. State, 591 S.W.2d 810, 819 (Tex.Cr.App. 1978) (on Motion for

Rehearing, Douglas, J., dissenting); 2 McCormick and Ray, Texas Practice, Evidence sec. 1324. There are three basic methods of proving character: (1) reputation of the person in the community; (2) personal opinion testimony of witnesses who know the person; (3) specific instances of conduct of the person from which inferences may be drawn. See, McCormick and Ray, sec. 1324, supra; Ray, Texas Law of Evidence, 3d Ed., 2 Texas Practice, sec. 1491, p. 168. This represents the present and proper conception of character, which is now settled as it has recently been codified in Rules 404(c) and 405 of the Texas Rules of Criminal Evidence.[7]

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[7]Rule 404(c) states:

> Character relevant to punishment. In the penalty phase, evidence may be offered by an accused or by the prosecution as to the prior criminal record of the accused. Other evidence of his character may be offered by an accused or by the prosecution.

Rule 405 states in pertinent part:

Historically, however, the meaning of character has been in a state of nebulous flux.

To aid our understanding and resolution of the question presented, a somewhat tedious exploration of the history of character evidence is necessitated. Character evidence has its roots in the earliest of common law and the evolution of differing methods of proving character has convoluted the meaning of the term itself. Originally in England, personal opinion testimony was an accepted and regularly used method of proving character. Wigmore, Secs. 1980-1982; 2 McCormick and Ray, Texas Practice, Evidence sec. 1432; 2 Weinstein's Evidence, p. 405-4 (1986).

> Methods of Proving Character
> (a) Reputation or Opinion. In all cases in which evidence of character ... is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

However, in 1865, in the case of Regina v. Rowton, 10 Cox Crim.Cas. 25 (Eng. 1865), proof of character became limited to only reputation testimony, to the exclusion of opinion testimony. The Texas origin of this common law view traces back to the 1882 case of Brownlee v. State, 13 Tex.App. 255, 257 (1882). Brownlee relied on Wharton's 1880 text on Criminal Evidence and upon the foundation civil case on the question--Boon v. Weathered, 23 Tex. 675, 684, 686 (1859). Thus, at common law and for years to follow, opinion testimony was held inadmissible to prove character, leaving reputation testimony as the only acceptable method of proof. See, Moncrief v. State, 707 S.W.2d 630, 631 and 634-635, fn. 1 (Teague, J., dissenting) (Tex.Cr.App. 1986); Brown v. State, 605 S.W.2d 572, 574 (Tex.Cr.App. 1980); Wrenn v. State, 597 S.W.2d 369, 372, fn. 1 (Tex.Cr.App. 1980); Ward v. State, 591 S.W.2d 810, 818

(Tex.Cr.App. 1980) (Opinion on State's Motion for Rehearing); Smith v. State, 414 S.W.2d 659, 661 (Tex.Cr.App. 1967); Watson v. State, 156 Tex.Crim. 585, 244 S.W.2d 515, 516 (1951); Rogers v. State, 126 Tex.Crim. 39, 70 S.W.2d 188, 188-189 (1934); Kirk v. State, 118 Tex.Crim. 462, 39 S.W.2d 61, 61-62 (1931); Trammell v. State, 10 Tex.App. 467, 468 (1881).

From the rule that reputation testimony was the only proper method of proving character evolved the misconception that character was the linguistic equivalent of reputation. The two terms began being incorrectly used interchangedly as synonymous. In Wharton's chapter on relevancy, it is stated,

> Character, in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real qualities of the individual as conceived by the witness. In other words, it is not what the individual in question really is, but what he is held to be by the society in

> which he moves. 'Character,' therefore, is to be regarded as convertible with 'reputation.' [footnote omitted]. A witness, therefore, who is called to speak to character,--unlike a master who is asked for the character of his servant,--cannot give the result of his own personal experience and observation, or express his own opinion, but in strict law he must confine himself to evidence of more general repute.
> Wharton's Criminal Evidence, ch. II, sec. 58 (1884).

Thus, character and reputation came to be viewed as one.

Legal scholars soon began to rebel against this view, acknowledging that character encompassed more than mere reputation. Thus, further evolution through time appears to have resulted in reputation evidence taking on a life of its own, separate and completely independent from character, leaving the term character to describe the other methods of proof, e.g., testimony concerning opinion and specific instances of conduct. At that point in time, opinion testimony apparently began to be seen as the

most acceptable type of character evidence, since specific instances of conduct were uniformly viewed as inherently prejudicial and reputation had become something completely independent from character. Thus, the meaning of character became even further convoluted as it began to be used by some writers to refer only to opinion testimony. With the passage of time, these varying misperceptions of character evidence were adopted and continually adhered to by different legal writers.

Thus, it comes as no surprise that even today we have judicial craftsmen voicing varying anomalous views of character. Regardless of the historically ubiquitous mislabeling of character, reputation testimony was, for many years, unquestionably the only approved method of proving character. However, various evidence experts such as Ladd, Wigmore, McCormick and Carlson,

constantly and fervently advocated the admissibility of opinion testimony as a much more reliable method of proving character than the inherently unreliable hearsay-based reputation method of proof. Ladd, Techniques and Theory of Character Testimony, 24 Iowa L.Rev. 498, 513 (1929); 7 Wigmore, Evidence, sec. 1986, p. 166 (1940). By the early 1960's, statutory modification prevailed and in the codification and amendments of the various evidentiary codes throughout the federal, state, criminal and civil levels the voices of these critics were being heard and adopted. See, Federal Rules of Evidence, R. 405; Model Code of Evidence, R. 305; Uniform Rule of Evidence, R. 48; Texas Rules of Evidence, R. 404-405; 20 Hous.L.Rev. 1, 187-203 (1983); Ladd, Some Observations on Credibility Impeachment of Witnesses, 52 Cornell Law Quarterly 242 (1967); Ladd, Witnesses, 10 Rutgers Law Rev. 523 (1956);

Ladd, Some Highlights of the New Federal Rules of Evidence, 1 Fla.Law Rev. 1, 27 (1973); 2 Weinstein's Evidence 405-1 (1986). It is within the early phases of this aura of evidentiary modernization that Texas drafted its new Code of Criminal Procedure.

The 1965 legislature, in drafting the new Code, created a bifurcated guilt-sentencing procedure which, at that time, was considered to be one of "the most controversial" changes in the law. Art. 37.07, supra; Special Commentary to Art. 37.07, V.A.C.C.P. 1966). In the same article in which this novel sentencing trial was created, our presently problematical section 3(a)[8] was also created to address the evidence admissible at this distinct punishment phase. Through their enactment of Sec. 3(a), the legislature made clear their contemplation of the fact that the

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[8]Originally Sec. 2(a), but subsequently renumbered.

invention of a bifurcated trial implicated new evidentiary questions specific to the punishment phase. Certain evidence that would normally be highly prejudicial and minimally probative at the guilt stage, could result in just the reverse prejudicial/probative analysis at the punishment phase, since guilt or innocence was no longer at issue.

Legislative history reveals that two proposed forms of section 3(a) were rejected prior to its adoption. The original Senate bill version stated, "[n]othing herein contained shall be construed to change or affect the existing law as to the admissibility of evidence pertaining to the character, reputation or previous conviction, if any." This version was rejected as well as the State Bar Committee's proposal which stated that, at punishment, evidence of the defendant's criminal record, reputation, character and "such other competent evidence

as in the discretion of the trial judge may be considered helpful in assessing punishment." Instead, the legislature codified a rule intermediate to these two, allowing evidence of prior criminal record, "reputation and character." Art. 37.07, Sec. 3(a), supra.

We review all of this common law and legislative history to enable us to resolve the question of whether, under 37.07, opinion testimony is admissible as a form of character evidence. We think that it is. Two issues are critical to our conclusion--the legislative creation of a separate punishment hearing and the wording of the statute itself.

Prior to the creation of the 1965 Code, it had unquestionably been the general rule that reputation testimony was the only permissible method of proving character. However, this rule was based upon an entire

body of caselaw which was adopted from civil law and concerned relevancy determinations involving guilt-innocence. The 1965 enactment of a bifurcated trial procedure, where an entirely separate punishment hearing was created, rendered the historical exclusion of opinion testimony at guilt-innocence subject to new scrutiny. The legislature for the first time had occasion to determine the admissibility of evidence only as to punishment. Further, this determination was made during a time when evidentiary codes were being modernized and the advocates of opinion testimony were beginning to be heard. Opinion testimony, as proof of character, was being accepted and statutorily authorized as admissible even as relevant to some guilt-innocence issues. These factors surely had a bearing on the drafter's decisions.

As to the language of the statute itself, it reads: "evidence may be offered ... as to

the [defendant's] prior criminal record ... general reputation and his character." Art. 37.07, Sec. 3(a), supra. At the outset, it appears that the drafters obviously fell prey to the linguistic problems discussed earlier. The imprecise and redundant use of the term reputation as a separate animal from character renders confusion. In truth, reputation is no more than a method of proving character--a type of character evidence.

Linguistic problems aside, the very language of the statute evidences the draftor's intent to make opinion testimony admissible. Where the statute reads, "and his character," use of the word and clearly denotes an intent to include some other method of proving character in addition to reputation.

Opinion testimony is clearly a method of proving character, and its admissibility is nowhere specifically precluded. Had the

statute read to admit "character evidence only in the form of reputation testimony" or solely "reputation testimony" or even only "character evidence," then one could make a plausible argument that opinion testimony was intended to be excluded based on the common law rule or the historical misperceptions discussed earlier. However, from the face of the statute it is clear that the legislature intended to admit character evidence which was thought to be something in addition to reputation. We find that the legislature's use of the term character, in addition to the term reputation and joined by the conjunctive term "and", evidences their intent to abrogate the old rule that reputation was the only approved method of proving character and admit opinion testimony.

Our conclusion is bolstered by what evidently has been regular trial court practice under 37.07, 3(a), supra. Opinion

testimony is obviously routinely admitted at punishment, ergo the creation of the embattled distinction between whether a witness is an opinion or a reputation witness. The importance of this distinction revolves around a determination of whether impeachment by "have you heard" questions is allowed. See, Rutledge v. State, 749 S.W.2d 50 (Tex.Cr.App. 1988) and cases cited therein. Reputation witnesses can be impeached with these questions whereas opinion witnesses cannot. Such a distinction simply could not have arisen if opinion testimony was always precluded from trial.

We now hold that under 37.07, 3(a), opinion testimony is admissible at the punishment phase. Thus, in the instant case, the trial court's blanket exclusion of opinion testimony was erroneous. However, a finding of error begins, not ends our inquiry. We now determine whether the error requires reversal.

Our current and relatively new standard to judge reversible error is embodied in Rule 81(b)(2) of the Texas Rules of Appellate Procedure which states:

> If the appellate record in a criminal case reveals error in the proceedings below, the appellate court shall reverse the judgment under review, unless the appellate court determines beyond a reasonable doubt that the error made no contribution to the conviction or punishment.

Although this is an appropriately high requirement for a finding of harmless error, the facts of the instant case meet this standard.

The trial court attempted to exclude the opinion testimony of eleven witnesses. Appellant perfected a bill of exception properly preserving the excluded testimony of six of these witnesses. As to the remaining five witnesses, who were not included in the bill of exception, we do not know what their excluded testimony would have been or even if

they were prevented from testifying to anything, and we will not speculate as to such. Baldwin v. State, 538 S.W.2d 109, 113 (Tex.Cr.App. 1976).

Of the six witnesses whose excluded testimony is preserved, only five of these were actually precluded from giving their opinion. One witness testified to his opinion in spite of the court's ruling and admonition. The five witnesses who did not testify to their opinion, did testify favorably concerning the defendant's reputation for truth and veracity and for being peaceable and law abiding, with the overall evidentiary effect of such testimony being virtually the same as opinion testimony.

Concerning the offense committed, appellant, an attorney, pled guilty to stealing over $10,000 from his client, Brenda Hummel. Appellant represented Hummel in a wrongful death suit against the U.S.

Government which culminated in appellant's negotiation of a settlement for $330,000. For his services appellant received a $66,000 fee. Upon appellant's advice Hummel decided to allow appellant to place $30,000 of the settlement in an educational trust fund for her children which was to mature when they reached 18 years of age.

Appellant took the $30,000 and, instead of investing it, he placed it in his own bank account. On the day of this deposit and approximately one week prior thereto, appellant had written two hot checks on this account in a sum totalling $10,000.

When Hummel's first child reached 18, she attempted to contact appellant. Initially, appellant avoided her and refused to return her calls. When he was finally forced to speak to her, appellant lied and stated that the money was in a C.D. drawing interest and would not mature until a later date. After

Hummel's continued persistence, appellant admitted that he had not only failed to invest the money but that he had already spent it. Appellant then staged an elaborate scheme to feign a mysterious disappearance and fled town only to decide later to return.

After his return, appellant met with Hummel and proposed a plan for the repayment of the money. Following the meeting appellant appeared arrogant and bragged to another attorney, "they fell for it." The seriousness of appellant's criminal conduct was best summarized by his own attorney as a "flagrant violation" of "[o]ne of the most sacred trust[s] that exists at least in the commercial world between an attorney and his client."

The punishment range for this second degree felony was probation or 2 to 20 years. Thus, the eight year sentence, while not the minimal punishment possible, was not the

maximum that could have been assessed. Based on all the testimony, we find beyond a reasonable doubt that the court's erroneous exclusion of the opinion testimony of five witnesses made no contribution to the punishment assessed. For an analogous harm analysis see, Rose v. State, 752 S.W.2d 529, 552-554 (Tex.Cr.App. 1987) (Opinion on Rehearing).

Although we disagree with the portion of the Court of Appeals' opinion addressing admissibility of evidence at punishment, the ultimate conclusion reached is correct. Consequently, the judgment of the Court of Appeals is affirmed.

McCORMICK, P.J., not participating.

MILLER, CAMPBELL and DUNCAN, JJ., concur in the result.

TEAGUE, J., dissents. See the dissenting opinion Judge Teague filed in Avan King v. State of Texas (Tex.Cr.App. # 863-85, ---

S.W.2d ---- delivered June 21, 1989). Also see Judge Teague's concurring opinion in Gary Lynn Murphy v. State of Texas (Tex.Cr.App. # 102-86, --- S.W.2d ---- delivered June 21, 1989).

CLINTON, Judge, concurring and dissenting.

I agree with the Judge White's plurality opinion inasmuch as it concludes that by "character" evidence, Article 37.07, s 3(a), V.A.C.C.P., the Legislature authorized use of opinion testimony as to character. I am frankly puzzled, however, that in holding evidence of specific conduct inadmissible, in accordance with the plurality opinion handed down this day in Murphy v. State, --- S.W.2d --- (Tex.Cr.App., No. 102-86, delivered June 21, 1989), he chooses to characterize that opinion as having "overruled a substantial amount of caselaw...." --- S.W.2d at ---. Though a handful of cases were "disapproved"

in Murphy, by and large our opinion on rehearing was an attempt to harmonize prior caselaw insofar as possible.

Having concluded error was committed in this cause, the plurality opinion proceeds to find it harmless, relying primarily on the Court's opinion on rehearing in Rose v. State, 752 S.W.2d 529 (Tex.Cr.App. 1987). The Court would do better, in my opinion, to await disposition of certain petitions recently granted to review various courts of appeals' application of Tex.R.App.Pro., Rule 81(b)(2) analysis to Rose error, before undertaking to rely on Rose here.

At any rate, this Court should not endeavor to conduct a harm analysis in the first instance, but should remand to the court of appeals "for it to exercise the unique power and authority retained by that court under Article V, ss 5 and 6 and other provision cited" at Juarez v. State, 758

S.W.2d 772, at 783-85 (Tex.Cr.App. 1988) (Clinton, J., dissenting). See also Hammett v. State, 713 S.W.2d 102, at 107 (Tex.Cr.App. 1986).

Agreeing with the plurality in its resolution of the substantive question of law we granted this petition to decide, I nevertheless dissent to its conclusion the error was harmless in this cause.

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

ROBERT E. HEDICKE, Appellant,	)	No. 08-84-00219-CR
v.	)	Appeal from 205th District Court of El Paso County, Texas (TC# 41203-205)
THE STATE OF TEXAS, Appellee.	)	

O P I N I O N

This is an appeal from a guilty plea before a jury to a charge of second-degree felony theft. The jury assessed punishment at eight years imprisonment. We affirm.

Appellant was an attorney licensed to practice in Texas. He initially represented the complaining witness in the probate of her first husband's estate. This professional relationship led to his undertaking her representation in a wrongful death action against the United States government for negligence on the part of William Beaumont Army Medical Center personnel proximately

causing the death of her first husband. On December 27, 1979, the government issued a settlement check for $330,000.00 payable to Appellant and the complainant. The amount covered the claims of the complainant and two minor children. On December 31, 1979, Appellant and the complainant went to the Franklin National Bank in El Paso to negotiate the check. Appellant received $66,000.00 as his fee for handling the case. The remainder of the money was placed in the trust account maintained by his law firm (Upcher and Hedicke). Subsequently, the bank obtained four $40,000.00 certificates of deposit for the complainant. An additional disbursement of $60,000.00 was made to her by Appellant's partner on January 9, 1980. Additional disbursements by Appellant left a residue of $30,000.00 in the trust account. On January 15, 1980, Appellant wrote a check for $30,000.00 drawn upon the trust account and

deposited it in his personal business account at the State National Bank in El Paso. A notation on the check indicated that the source was the Potter funds (the complainant's married name at the time). Without these funds, Appellant's personal account would have been inadequate to cover two $5,000.00 checks drawn on that account on January 7 and 15, 1980. These checks were given to Appellant's sister-in-law to assist her in making a down payment on a house. By February or March, 1980, Appellant had converted the remaining $20,000.00 in Potter funds to his own use. The $30,000.00 had been earmarked for trust investment of the settlement sums allocated to the complainant's two minor children, until each reached eighteen years of age. During the next two years, Appellant took steps and made assertions to the complainant indicating that, in fact, certificates of deposit had been purchased with these funds for the

benefit of the children. The older child reached eighteen in December, 1982. As the date approached, the complainant made several unsuccessful attempts to contact Appellant. At the end of December, he finally advised her that the older child's certificate of deposit would not mature until the end of January, 1983. Toward the end of January, Appellant "staged" his own disappearance from his El Paso apartment and fled to Phoenix, Arizona. He abandoned his car there and ultimately fled to San Diego, California. After an absence of several days, he returned to El Paso and advised his law partner (Havekost) and an associate (Tanzy) of his conversion of the Potter funds. On January 31, he met the complainant and her second husband, advised them of the conversion, signed an acknowledgement of indebtedness, and made some tentative offers of periodic repayment. No repayment was ever made. Appellant's license

was suspended by the grievance committee for a period of five years and the present criminal proceedings were instituted.

As previously stated, Appellant entered a plea of guilty before a jury. He admitted the factual events recited above. Appellant testified that on January 15, 1980, he discovered that his partner had made the $60,000.00 disbursement to the complainant. There was no illegality or unethical aspect of the act, but it was contrary to their partnership policy in terms of who should be drawing against particular client funds held in their joint trust account. Accordingly, out of alleged concern to safeguard the remaining $30,000.00, Appellant tried to transfer the funds into his own trust account which he had set up while an assistant county attorney. The cashier at State National Bank told him that the trust account had been closed. He then deposited the $30,000.00 in

a personal business account which was still active.

He apparently did not discuss the $60,000.00 disbursement with his partner. He did not return the $30,000.00 to the Upcher and Hedicke Trust Account. He did not try to open a new trust account. He simply deposited it in his own account and not so gradually expended it. Appellant testified that at the moment of transfer on January 15, he had no intention of converting the money to his own use. the act was solely triggered by his partner's January 9 disbursement. Of course, the uncontroverted evidence was that on January 7, even prior to the disbursement on January 9 or its discovery on January 15, Appellant issued the first of two $5,000.00 insufficient checks on his personal account as part of his generous commitment to help his sister-in-law buy a home. The second $5,000.00 check was coincidentally issued on

the same day the Potter funds were transferred. Neither check would have cleared without the conversion of the complainant's funds. Appellant testified that at the moment of transferring the funds to his personal account he had no intent to convert them to his own use. He acknowledged that soon thereafter he began to use the money as his won and that the funds were exhausted by February or March.

In Ground of Error No. One, Appellant contends that the court should have withdrawn the guilty plea for two reasons. First, Appellant contends that the court should have sua sponte withdrawn the plea when Appellant testified in such a manner as to negate an element of the offense as indicated. Appellant testified that at the moment he deposited the trust funds in his personal account on January 15, 1980, he had no intent to convert the funds to the benefit of himself

or his in-laws or to deprive the owner of the funds. He admitted that shortly thereafter his state of mind and his actions satisfied such proof requirement. The negating evidence must go further than tending to show a defensive issue. It must reasonably and fairly present a full defense to a finding of guile. **Garza v. State**, 687 S.W.2d 325 (Tex.Crim.App. 1985); **Varela v. State**, 553 S.W.2d 111 (Tex.Crim.App. 1977). Appellant asserts that the State's indictment necessitates a finding that his theft intent be in existence at the time of the initial transfer of funds on January 15. He relies upon **Taylor v. State**, 555 S.W.2d 483 (Tex. Crim.App. 1977), in which a guilty plea conviction was overturned because of defensive evidence that the defendant had no intent to harm or defraud at the time he passed the check. Maintenance of the present guilty plea is not inconsistent with **Taylor** because of the difference in

pleading. While both indictments contain an "on or about" date allegation, the effect is different in each case. The **Taylor** pleading required the jury to find that the passing took place on or about the alleged date, allowing certain flexibility in proof and finding. The precise actus reus of the offense was nonetheless expressly pled, and whatever the date of its occurrence, had to be accompanied by the alleged criminal intent. In our case, the initial deposit in Appellant's personal account was not expressly pled as an actus reus element of the offense, despite the use of the January 15 commission date. All that was required for proof and finding was that on or about such date Appellant exercised further control over the funds, without effective consent and with intent to deprive. Appellant himself admitted that such mental and physical culpability occurred shortly after the deposit and that,

in fact, all funds had been so converted by March. The testimony relied upon by Appellant may have served some mitigating function, but did not give rise to a defense requiring withdrawal of the guilty plea.

The second basis for asserting that the guilty plea should have been withdrawn is an alleged breach of a plea bargain. A sentence recommendation was made by the adult probation department of seven years probation under the deferred adjudication provisions of Tex. Code Crim.Pro.Ann. art. 42.12, sec. 3d, along with a fine of $1,000.00. Appellant's attempt to characterize this as a plea bargain is founded upon Tex.Code Crim.Pro.Ann. art. 26.13 and the trial court's own written admonition given at the time the pre-sentence report was requested. We shall address these bases separately. Article 26.13 states that rejection of a plea agreement by the court requires that the judge permit the defendant

to withdraw his plea. Article 26.13 will not support Appellant's position for two reasons. First, the recommendation was not a plea agreement within the contemplation of the statute. Under Subsections (a)(2) and (a)(3) of the statute, a plea bargain agreement is one entered between the State's prosecutor and the defendant. This does not include an evaluation made by the adult probation department which functions as a arm of the court, not the prosecutor's office. **See, Ex parte Shuflin**, 528 S.W.2d 610 (Tex.Crim.App. 1975). We did not merely suggest that interpretation in **Mendoza v. State**, 649 S.W.2d 126 (Tex.App.--El Paso 1983, no pet.), we expressly held so in response to one ground of error. That position was reiterated in **Harrelson v. State**, 668 S.W.2d 455, 456 (Tex.App.--El Paso 1984), **aff'd**, 692 S.W.2d 659 (Tex.Crim.App. 1985). **See also: Contreras v. State**, 658 S.W.2d 334, 338 (Tex.App.--Austin 1983, no pet.). **Ex**

parte Rogers, 629 S.W.2d 741 (Tex.Crim. App. 1982), in no way stands for the proposition that such a plea recommendation by the probation department equates to a plea bargain. In that case, the Court of Criminal Appeals did review a 1980 conviction out of this same trial court. The opinion states that the record in **Rogers** discloses a judicial acknowledgment of the existence of a plea bargain. Nowhere does the opinion indicate that the basis for the plea bargain was a probation department recommendation. The argument is clearly outside the record of this case and **Rogers**.

Secondly, even if this were a plea bargain, its rejection by the court would not necessitate a sua sponte withdrawal of the plea by the trial judge. Article 26.13 merely requires that the defendant bye afforded permission to withdraw the plea on his own motion. No such motion was made by this

Appellant until the appellate brief was filed. Rejection of a plea bargain does not abstractly or practically mean that a contested jury trial is automatic. It simply means that the defendant must be allowed to reconsider his options and, should he so elect, move to withdraw his plea. Rejection of a bargain may still be followed by a guilty plea to judge or jury or a contested trial on the merits. The critical issue is whether the guilty plea was entered under a false impression as to the continuing acceptability of the bargain.

Appellant's brief and his motion for new trial present a somewhat jumbled explanation of the events leading the guilty plea. Nonetheless, an examination of the entire record enables us to reconstruct those events. Appellant requested a pre-sentence report which was prepared by the probation department, making the recommendation

mentioned above (deferred adjudication probation). Appellant expressed to the court and the prosecutor a decision to waive the jury and accept such a resolution. The State advised the court that they would not agree to a waive of jury under Tex.Code Crim.Pro.Ann. art. 1.13. The State took the further position that the return of a verdict of guilt by the jury precluded the court from thereafter proceeding under the deferred adjudication provision of Article 42.12, sec. 3(d). The trial judge accepted this position. Whether this interpretation was correct or not is not before us as a ground of error. Fully cognizant that the probation department recommendation was no longer (if ever) within the contemplation range of the trial judge, Appellant elected to proceed with a plea of guilty to the jury. Thus, the second basis for construing the recommendation as a plea bargain (the trial court's pre-sentence report

at admonition) is equally without merit. Appellant was properly admonished by the trial judge and advised that the probation decision of the jury would be accepted by the court. Appellant was under no delusions with regard to his prospects of pursuing the probation department recommendation. No protest or motion to withdraw the plea was ever lodged prior to the motion for new trial. Even after the jury returned its verdict, the Appellant did not seek either a probated sentence or a deferred adjudication probation on the combined basis of Sections 3c and 3d of Article 42.12, recognizing that receipt of a jury verdict is distinct from entering judgment thereon.

The precise ground of error complains of the court's failure to sua sponte withdraw the guilty plea. Appellant's original punishment expectations were not founded upon a plea bargain, were expressly dashed prior to his

entering the guilty plea, would not in any event require withdrawal on the court's own motion, and were not pursued by any action on Appellant's part to withdraw his plea. Ground of Error No. One is overruled.

The rationale for rejecting the second aspect of Ground of Error No. One is equally applicable to Ground of Error No. Five, and it is overruled.

In Ground of Error No. Two, Appellant contends that he was prosecuted under the wrong statute, and that if any offense was committed it would have been misapplication of fiduciary property under Penal Code section 32.45, not theft under Penal Code section 31.03. A reviewing court must examine the evidence in the record in light of a comparison of the elements of the offenses established by the competing penal statutes. If they are pari materia, the special statute more precisely depicting the criminal conduct

must take precedence. **Sarrat v. State**, 543 S.W.2d 391 (Tex.Crim. App. 1976); **Ex parte Harrell**, 542 S.W.2d 169 (Tex.Crim.App. 1976).

In **Tawfik v. State**, 643 S.W.2d 127 (Tex.Crim.App. 1982), the statute proscribing criminal simulation, Tex.Penal Code Ann. sec. 32.22(b)(Vernon 1974) was found to control over the general theft statute in a prosecution for selling fake Egyptian artifacts. the former statute was held to be a more precise description of the type of victim, type of offender and actus reus of the offense than the provisions of Section 31.03. The conviction was overturned.

In **Williams v. State**, 641 S.W.2d 236 (Tex.Crim.App. 1982), another general theft conviction was reversed upon a finding that the conduct proven was more precisely defined by Section 32.33, proscribing the hindering of a secured creditor. Greater statutory precision was noted with regard to the type

of victim, type of property and means used to commit the offense.

Similarly, in **Jones v. State**, 552 S.W.2d 836 (Tex.Crim.App. 1977), the Court of Criminal Appeals held that fraudulently representing a condition of unemployment to obtain welfare benefits should have been prosecuted under the former Public Welfare Act rather than the theft statute. Again, the victim, type of property and means used were found to be more specific in the welfare statute. **See also: Falcone v. State**, 682 S.W.2d 418 (Tex.App.--Houston [1st Dist.] 1984, no pet.)(theft of trade secrets under Section 31.05 more precise than general theft provision).

The question not addressed in any of the foregoing cases is which statute controls when the special statute is generally more precise but the general statute contains one or more additional and more precise elements not

constituting an element of the offense described in the special statute. Such is the case here. Admittedly, Appellant's conduct is precisely depicted by Section 32.45. But is he guilty of more, especially when the additional character of the offense is not required by Section 32.45, but is a element of Section 31.03? As the Practice Commentary to Section 32.45 points out, an intent to benefit the actor or some third party is not an element of misapplication, but is an element of theft. Both improper benefits were demonstrated by the evidence in this case. Furthermore, an intent to deprive the owner is not a requisite of misapplication as it is in the case of theft.

A similar distinction is noted by the Practice Commentary to Section 31.05, but was not critical to the decision in **Falcone** since that court found insufficient evidence of an

intent to deprive the owner of the documents which were to be criminally reproduced.

In our case, an intent to deprive the owner was established. Appellant may protest that he intended to repay or replace the stolen funds with interest, with no ultimate loss to the complainant. This superficially appealing assertion will not withstand closer scrutiny. Ultimately, no repayment was ever made. More importantly, if one were to steal another's 1985 Ford Thunderbird automobile with intent to use or sell it, ultimate replacement with an identical but different vehicle would not negate theft. The offense has already been committed. By the same token, the fact that fungible currency was taken in this case would not cause its replacement to negate the offense of theft. Thus, the general theft statute describes a more precise criminal intent than the fiduciary misapplication statute, and the

existence of the additional element was substantiated by the evidence in the record.

An additional reason for overruling this present complaint is found in the logic presented by the 14th Court of Appeals in **Boyette v. State**, 632 S.W.2d 915, 919-920 (Tex.App.--Houston [14th dist] 1982, PDRR). There, the court found that nay error in prosecuting under the theft statute, as opposed to Section 32.45, was harmless due to the fact that the value of the property involved would have resulted in the defendant's exposure to the same third-degree felony punishment range. The same is true here; the theft and misapplication provisions would have both produced a second-degree felony liability. Ground of Error No. Two is overruled.

In Ground of Error No. Three, Appellant contends that the court erroneously denied four challenges for course against prospective

jurors (Miller, Walker, Trujillo and Scully). The first three challenges were based upon asserted inability to consider the full range of punishment, including probation. Excluding Appellant's improper efforts to disqualify these jurors by contracting as to the specific facts of this case, the jurors were adequately rehabilitated upon further inquiry by the prosecutor and the trial judge. Miller, Trujillo and Walker each finally asserted that they could keep an open mind on the full range of punishment and could conceive of theft situations where probation would be appropriate. They personally could reasonably consider probation in an appropriate case. The challenges for cause against these jurors were properly denied. **Barefoot v. State**, 596 S.W.2d 875, 886-997 (Tex.Crim.App. 1980).

Prospective juror Scully presents a different problem. Dr. Scully was the employer of the complainant's present husband.

He had known them for several years. He had become acquainted with the purported facts of the case through his social and professional association with the family. In addition, he had upon several occasions been an adverse witness in federal litigation held by the Appellant. At first, he expressed misgivings about the effect of these contacts on his possible service as a juror.

Q. Is it fair to say if you were sitting as a juror in this case, all of these other things you've heard would necessarily play a part in your rendering of a verdict? It would be very hard to put them aside?

A. I think it would be hard to put them aside.

THE COURT: The question is: Do you think you could follow the instructions and decide the case based solely on what you hear in the courtroom?

JUROR SCULLY: I think I could, based on what I hear in court.

. . .

Q. Given the fact that you know the Hummels, you were on the opposite side of litigation in federal court, would the combination of that make you lean more towards one side or the other?

A. I would try to be fair and listen to the evidence.

THE COURT: The only thing I can ask you is what's your best judgment? Do you think you could be?

JUROR SCULLY: I think I could.

THE COURT: Okay.

Under the circumstances, it would seem to have been more advisable to er on the side of caution and grant the challenge for cause. Nonetheless, we need not reach the merits of the challenge. There is no disagreement as to the procedural requirements for preserving error with regard to a denial of a challenge for cause. **See: Barrow v. State**, 688 S.W.2d 860, 863 (Tex. Crim.App. 1985). The challenge is made, with the basis expressly stated. It is denied. An additional peremptory challenge is requested and denied. The defendant exhausts his peremptory challenges and is then required to accept the seating of an unacceptable juror. Appellant asserts that

this course of action was followed and identified four objectionable jurors. In the statement of facts, the trial judge expressly denied additional peremptory challenges. An examination of the juror strike lists discloses, however, that in fact, by inadvertence or otherwise, the defense was provided an additional peremptory challenge. The defense and State juror strike lists are labeled as such. The jurors excused by agreement or cause are clearly reflected on these sheets and the court's list. The peremptory challenges made by each side are also clearly identified. The State struck ten jurors. The defense struck eleven. Appellant exercised peremptory challenges against jurors 6, 7, 10, 21, 22, 24 (Scully), 25, 31, 36, 37 and 38. He numbered his peremptory challenges one through ten, with two number sixes, one on the first page and one on the second. The twelfth juror seated was panel member 39.

Thus, the eleven peremptory challenges had full force and effect in determining the twelve members of the jury. In effect, Appellant received an additional peremptory challenge. Even if the ruling on Juror Scully was error, it was rendered harmless by the replacement of the peremptory challenge used to exclude him from service. Ground of Error No. Three is overruled.

In Ground of Error No. Four, Appellant complains of the exclusion of character evidence offered on his behalf in support of his bid for probation. Six bills of exception contained in the supplemental record disclosed the intended content of the excluded testimony. The bills reflect that the six witnesses would have testified as to their personal opinion of Appellant's character, the specific origin of their acquaintance with him, the nature of legal matters which he handled on their behalf, the successful

outcome of those legal proceedings, Appellant's active participation in his church, his volunteer work with the church's youth work, its Christmas drama group, its softball team, a Thanksgiving church dinner, and his waiver or reduction of attorney fees to help struggling clients.

Despite the exclusion ruling, the bill of exception witnesses all testified at trial, in addition to five other character witnesses. The jury was permitted to hear the employment and social position of these eleven witnesses and the basis for their social, religious and professional relationships with the Appellant. Client witnesses were permitted to explain the nature of the legal matters in which Appellant represented them. Despite the court's ruling, several testified as to the successful outcomes of the legal proceedings. The others were implicitly satisfied with Appellant's handling of their cases. One witness

testified as to the proper handling of his personal injury recovery funds by Appellant. The jury was also fully exposed to Appellant's work with the church youth organization, the Christmas play, the church choir and the softball team. Despite the court's restriction to reputation testimony, several witnesses managed to insert expressions of personal opinion and trust. In summary, the only actual exclusion involved Appellant's contribution to the success of the softball team, the church's Thanksgiving dinner, the personal character opinions of all proffered witnesses and incidental incidents of specific social and professional conduct.

Case law is somewhat less than clear as to what is and what is not error in the area of exclusion of character evidence under Tex.Code Crim.Pro.Ann. art. 37.07. Similar types of evidence have been reviewed by the Court of Criminal Appeals in numerous cases.

Singletary v. State, 509 S.W.2d 572 (Tex.Crim.App. 1974); **Cleveland v. State**, 502 S.W.2d 24 (Tex.Crim.App. 1973); **Logan v. State**, 455 S.W.2d 267 (Tex.Crim.App. 1970); **Miller v. State**, 442 S.W.2d 340 (Tex.Crim.App. 1969); **Coleman v. State**, 442 S.W.2d 338 (Tex.Crim.App. 1969); **Culvahouse v. State**, 440 S.W.2d 637 (Tex. Crim.App. 1969); **Allaben v. State**, 418 S.W.2d 517 (Tex.Crim.App. 1967). None of the above cases sustained the ground of error challenging the evidentiary exclusion. Even where the court concluded that error had occurred, it was not found reversible, particularly where other comparable evidence was elicited before the juries. **Coleman, supra; Miller, supra; Culvahouse, supra.** That is the case here. Even if certain portions of the evidence should have been admitted, the difference between that content and the actual presentation to the

jury was insufficient to justify a reversal.

Ground of Error No. Four is overruled.

The judgment is affirmed.

/s/ Stephen F. Preslar
STEPHEN F. PRESLAR,
Chief Justice

July 16, 1986
Before Panel No. 2
Preslar, C.J., Osborn and Schulte, JJ.

(Not Published)